State of Michigan
In The
Supreme Court

APPEAL FROM THE MICHIGAN COURT OF APPEALS

JOYCE McDOWELL, et al,

Plaintiffs-Appellees,

Supreme Court No. 127660

v

CITY OF DETROIT, et al,

Defendants-Appellants.

Court of Appeals No: 246294
Wayne County Circuit Court No: 00-039668-NO

DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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STATEMENT OF QUESTIONS PRESENTED

I.A. IS THE COMMON LAW RULE THAT THE DEMISED PREMISES INCLUDE EVERY AREA OF THE SPACE TO THE OUTER WALLS?

The trial court did not address this issue.

The Court of Appeals did not address this issue.

Plaintiffs-Appellees did not address this issue.

Defendants-Appellants contend the answer should be, "Yes".

I.B. IS THERE LANGUAGE IN THE LEASE WHICH DEMONSTRATES THAT DEFENDANTS DID NOT DEMISE THE ENTIRE PREMISES TO MS. CAMPBELL?

The trial court did not address this issue.

The Court of Appeals answered, "Yes".

Plaintiffs-Appellees contend the answer should be, "Yes".

Defendants-Appellants contend the answer should be, "No".

I.C. WAS THE ORIGIN OF THE FIRE IN THE DUPLEX PLUG, WHICH WAS PART OF THE DEMISED PREMISES?

The trial court did not address this issue.

The Court of Appeals did not address this issue.

Plaintiffs-Appellees contend the answer should be, "No".

Defendants-Appellants contend the answer should be, "Yes".

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STATEMENT OF JURISDICTIONAL BASIS

On January 17, 2003, the trial court entered an order denying governmental immunity to Defendants. (1a: Wayne County Docket Entries, No. 203). Defendants filed a Claim of Appeal to the Court of Appeals on January 22, 2003. (1a: Court of Appeals Docket Entries, No. 1). The Court of Appeals issued its opinion on November 9, 2004. (Id., No. 69). Defendants timely appealed from that opinion. (Id., No. 70). On January 13, 2006, this Court entered an order granting leave to appeal. (Id., No. 85). This Court has jurisdiction by virtue of MCR 7.301(A)(2).

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STATEMENT OF FACTS

This is a wrongful death and personal injury action which arises out of a December 1, 2000, fire in which six children died and two other persons were injured. Defendants interposed the defense of governmental immunity. Defendants appeal from the Court of Appeals' holding that Plaintiffs may recover on a theory of trespass-nuisance.[1] The pertinent facts follow.

Historical Facts[2]

On July 22, 1999, JO-ANN CAMPBELL entered into a Dwelling Lease (2a)[3] with the DETROIT HOUSING COMMISSION for property at 2537 St. Antoine, Detroit.

Beginning in June 2000, MS. CAMPBELL repeatedly complained of problems with the electricity and furnace. (20a, ¶9; 26a, ¶6). The repairs were not made. (20a, ¶10; 26a, ¶11).

On December 1, 2000, MS. CAMPBELL's apartment was occupied by herself, her three minor children, her sister JUANITA FISH,

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[1]The Court of Appeals also would have allowed Plaintiffs to proceed on a theory of negligent nuisance. However, at the December 15, 2005, hearing on the application for leave to appeal to this Court, Plaintiff conceded that negligent nuisance is not an exception to governmental immunity. Accordingly, this brief will be limited to the trespass-nuisance claim.

[2]This account accepts as true the factual allegations of Plaintiffs' Complaint (except as conclusively contradicted by other material), and accepts Plaintiffs' version of the facts as documented by other material submitted to the trial court. Maiden v Rozwood, 461 Mich 109, 119-20; 597 NW2d 817 (1999).

[3]The Dwelling Lease was attached as Exhibit C to Defendants' Motion for Summary Disposition and as Exhibit 2 to Plaintiffs' response thereto.

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and her sister's four minor children. (19a, ¶6). MS. CAMPBELL left the apartment at approximately 9:00 a.m. (20a, ¶7).

At approximately 10:00 a.m., a fire broke out in the apartment. (20a, ¶8). According to Plaintiffs' expert, the fire was caused by an electrical defect which ignited insulating materials in the electrical outlet in the wall. (40a, p 46).[4] As a result, six of the children were killed, and MS. FISH and one of her children were injured. (21a, ¶13; 26a-27a, ¶11).

The Trial Court Litigation

On December 6, 2000, five days after the fire, Plaintiffs filed their Complaint. (1a: Wayne County Docket Entries, No. 1). The Complaint alleged a single count of negligence. (20a).

On March 15, 2001, Plaintiffs filed a First Amended Complaint. (1a: Wayne County Docket Entries, No. 26). That pleading included counts for nuisance per se (Count I), nuisance (Count II), trespass (Count III), breach of contract (Count IV), breach of express and implied warranties of habitability and quiet enjoyment (Count V), and violation of the housing code (Count VI). (26a-37a).

On November 5, 2002, Defendants filed a Motion for Summary Disposition on the grounds, inter alia, of governmental immunity. (1a: Wayne County Docket Entries, No. 167). On December 6, 2002,

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[4]MR. CHURCHWARD's deposition transcript was attached as Exhibit 4 to Plaintiff's Response to Defendants' Motion for Summary Disposition. Defendants contest MR. CHURCHWARD's opinion. (See 46a-49a, attached as Exhibit E to Defendants' Motion for Summary Disposition). However, for purposes of this appeal, Defendants accept Plaintiffs' version of the occurrence.

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Plaintiffs filed their response. (Id., No. 172). A hearing was held on December 11, 2002. (50a). On December 18, 2002, the trial court, Hon. Edward Thomas, denied Defendants' motion in all respects save two: (1) He dismissed Count VI; and (2) He ruled that the operation of the DHC is not a propriety function. (92a).[5] An order to that effect was entered January 17, 2003. (104a).

The Appeal

On January 22, 2003, Defendants filed a Claim of Appeal to the Court of Appeals pursuant to MCR 7.202(7)(a)(v). (1a: Court of Appeals Docket Entries, No. 1). Plaintiffs cross-appealed. (Id., No. 17).

On November 9, 2004, the Court of Appeals, per Judges Donofrio, White, and Talbot, issued a published opinion authored by Judge Donofrio (106a). The panel held that the trial court erred by refusing to grant summary disposition on Plaintiffs' claims of nuisance per se (Count I.), trespass (Count III.), and the contract claims (Counts IV.-V.). (Id., 110a, 112a-113a, 114a-115a). The Court also held that the trial court correctly granted summary disposition on the count alleging violation of the Housing Code (Issue VI.), and on Plaintiffs' argument that Defendants were engaged in a proprietary function. (115a-118a).[6]

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[5]The transcript is inaccurate as to the ruling on Count VI. (92a), as the January 17, 2003, order (104a) demonstrates.

[6]Judge White concurred in result only. (118a).

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However, the panel also held that Plaintiffs could recover on theories of "negligent nuisance" and trespass-nuisance. (111a-112a, 113a-114a).

On December 20, 2004, Defendants filed an Application for Leave To Appeal to this Court. (1a: Court of Appeals Docket Entries, No. 70). Pursuant to an order of this Court, oral argument on the application was held December 15, 2005. (Id., No. 84). At that argument, Plaintiffs conceded on the record that negligent nuisance is not an exception to governmental immunity.

On January 13, 2006, this Court entered an order (119a) granting leave to appeal and directing the parties to include among the issues briefed:

> (1) Whether, in general, a lease includes both the inner and outer walls of a leased premises; and
>
> (2) Whether the general rule was modified by the portion of the subject lease that limited the tenant's right to make "alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management".

(119a).

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I. AS A MATTER OF LAW, THE FACTS ALLEGED IN THE INSTANT CASE WILL NOT SUPPORT A CLAIM OF TRESPASS-NUISANCE BECAUSE THE FIRE STARTED ON THE TENANT'S PREMISES.

The following discussion will first set forth the pertinent concepts and case law defining trespass-nuisance. In separate sub-issues, Defendants will then demonstrate that: (1) The common law rule is that a lease includes both the inner and outer walls[7] of the leased premises; (2) There is no language in the lease in the instant case which even addresses, much less contravenes, that principle; and (3) In any event, the fire originated in an electrical outlet, which was part of the demised premises.

Preservation

In the trial court, Defendants advanced this argument in their Motion for Summary Disposition (Defendants' [11/5/02] Motion for Summary Disposition: Brief in Support, p 17) and again in their Reply (Defendants' [11/27/02] Reply to Plaintiffs' Response to Defendants' Motion for Summary Disposition, p 10).

In the Court of Appeals, Defendants renewed this argument in their Brief on Appeal (Defendants' Brief on Appeal as Appellants, Issue II.) and in their Reply Brief (Defendants' Reply Brief as Appellants, Issue I.B.).

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[7]At oral argument in the Court of Appeals, the parties agreed that the outer wall was the exterior of the building. (Record).

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Standard of Review

The application of a general common law rule to a given set of factors is a question of law for this Court's de novo review. See Forbes v Gorman, 159 Mich 291; 123 NW 1089 (1909). The construction of language in a contract, such as a lease, is also a question of law for this Court's de novo review. Schmalfeldt v North Pointe Insurance Co, 469 Mich 422, 426; 670 NW2d 651 (2003).

Discussion

The essence of the trespass-nuisance exception is a **physical intrusion onto the plaintiffs' land**. In Hadfield v Oakland County Drain Commissioner, 430 Mich 139; 422 NW2d 205 (1988), this Court made that clear a number of times:

> "Trespass-nuisance shall be defined as a direct trespass upon, or the interference with the use or enjoyment of, land that results from a **physical intrusion** caused by, or under the control of, a governmental entity."

430 Mich at 145 (emphasis added).

> "Justice RYAN described **intruding nuisances** as 'situations wherein damage is caused by the **direct trespass** of an instrumentality *from government-owned land* **onto private property**.' [Citation omitted]. We do not adopt the source limitation on the exception that might be inferred from the emphasized language of Justice RYAN's opinion."

Id. at 154 n 7 (italics in original) (other emphasis added).

> "The earliest cases to recognize governmental liability involved some type of **direct invasion** by the government entity **of the plaintiffs' land**. **The actions** were characterized either as trespass or nuisance, but **invariably focused on the aspect of direct, physical invasion**. This focus stemmed from the primary rationale

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> imposing liability: The 'Taking' Clause of the constitution, beginning in Const 1835, art 1, §19, and continuing through out present constitution, Const 1963, art 10, §2, guarantees that the property rights of citizens are protected from government taking 'without just compensation.' **Trespassatory invasions** that stops short of being 'takings' of property were considered actions for which governmental entities should not escape liability."

Id. at 154-55 (emphasis added).[8]

Every case cited and analyzed in Hadfield involved physical intrusion onto the plaintiffs' property.[9] The Hadfield Court characterized those cases as follows:

> "Generalizing from these early cases, it appears that where an **invasion or intrusion onto a plaintiff's land** occurred, the defendants were often found liable,

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[8]Justices Boyle and Levin concurred in Justice Brickley's opinion as far as it went, but also argued for additional exceptions. However, there was no majority for anything other than Justice Brickley's discussion of trespass-nuisance.

[9]Pennoyer v City of Saginaw, 8 Mich 534 (1860) (surface water thrown on plaintiff's land); Sheldon v Village of Kalamazoo, 24 Mich 383 (1872) (physical entry and destruction of fences); Ashley v City of Port Huron, 35 Mich 296 (1877) (casting water on plaintiff's premises); Rice v Flint, 67 Mich 401, 34 NW 719 (1887) (grade change causing flooding onto plaintiff's land); Seaman v City of Marshall, 116 Mich 327, 74 NW 484(1898) (sewer causing water accumulation on plaintiff's property); Ferris v Board of Education of Detroit, 122 Mich 315, 81 NW 98 (1899) (ice and snow falling onto plaintiff's property); Attorney General ex rel Township of Wyoming v City of Grand Rapids, 175 Mich 503, 141 NW2d 890 (1913) (sewage cast on plaintiff's land); Donaldson v City of Marshall, 247 Mich 357, 225 NW2d 529 (1929) (drain causing accumulation of water on plaintiff's land); Robinson v Wyoming Township, 312 Mich 14, 19 NW2d 469 (1945) (damages caused by flooding resulting from failure of defendant's dam); Rogers v Kent Board of County Road Commissioners, 319 Mich 661, 30 NW2d 358 (1948) (installation of metal post on plaintiff's property); Defnet v City of Detroit, 327 Mich 254, 41 NW2d 539 (1950) (maintenance of active sewer under plaintiff's land); Herro v Chippewa County Road Commissioners, 368 Mich 263, 118 NW2d 271 (1962) (water impounded by defendant flooding onto plaintiff's property).

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> regardless of whether the municipality acted directly, through an order perhaps, or whether its agents acted intentionally or negligently to produce the invasion. **Consideration of the effect** (**the invasion**), rather than of the act that caused the effect, **continued to be the primary focus through the 1950's**."

430 Mich at 161-62 (emphasis added).

It is thus beyond question that a physical intrusion onto the plaintiff's premises is an essential element of trespass-nuisance. E.g., Bronson v Oscoda Township (On Second Remand), 188 Mich App 679, 683; 470 NW2d 688 (1991), lv den, 440 Mich 877 (1992). That element is absent in the instant case.

In the following discussion, Defendants will demonstrate the absence of an intrusion in two ways. First, they will show that as a matter of law the interstitial area between the walls was part of the demised premises, and that nothing in the lease is to the contrary. (Issue I.A.-I.B.). Second, Defendants will demonstrate that the testimony of Plaintiffs' own expert established that the source of the fire was an electrical outlet, which was plainly part of the demised premises. (Issue I.C.).

A. THE COMMON LAW RULE IS THAT THE DEMISED PREMISES INCLUDE EVERY AREA OF THE SPACE TO THE OUTER WALLS.

Although Michigan case law on this point is sparse, what exists fully supports Defendants' position on this issue. Moreover, those cases are consistent with the common law rule in other states.

In Forbes v Gorman, 159 Mich 291; 123 NW 1089 (1909), the dispute involved the scope of the tenant's right to place signage

on the outside of the leased premises. In the course of its analysis, this Court said:

> "The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, **including the outer as well as the inner walls**."

Id. at 294 (emphasis added).

The Court of Appeals has rejected the very argument advanced by Plaintiffs in a virtually indistinguishable case. In Morris v Fredenburg, Court of Appeals No. 186186 (rel'd 10/25/96; unpublished) (121a), a fire ignited in the upstairs apartment of a two-story house owned by the defendant. The defendant obtained summary disposition on the ground, inter alia, of lack of knowledge of the wiring defect which caused the fire. (121a). As an alternative argument, the plaintiff maintained that the space between the walls was a common area for which the defendant was responsible pursuant to MCL 554.139.

The Court of Appeals, per now-Justice Corrigan and now-Chief Justice Taylor, held that "the trial court appropriately ruled, without regard to the statute, that the wiring space between the walls and above the ceiling was not, as a matter of law, a common area." (123a).

That holding is in accord with the common law rule that in the absence of contrary language in a lease, the exterior walls of the premises are part of the demise to the lessee. E.g., 400 North Rush, Inc v D J Bielzoff Products Co, 347 Ill App 123, 106 NE2d 208, 210 (1952); Hilburn v Huntsman, 187 Ky 701, 220 SW 528

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(1920); Needle v Scheinberg, 187 Md 169, 49 A2d 334, 336 (1946); Kretzer Realty Co v Thomas Cusak Co, 196 Mo App 596, 190 SW 1011, 1013 (1916); Nyer v Munoz-Mendoza, 385 Mass 184, 430 NE2d 1214, 1216 (1982); 265 Tremont Street, Inc v Hamilburg, 321 Mass 353, 73 NE2d 828, 832 (1947); Bee Bldg Co v Peters Trust Co, 106 Neb 294, 183 NW 302, 303 (1921). That necessarily includes the "interstitial" area between the inside and outside walls.

B. THERE IS NO LANGUAGE IN THE LEASE WHICH DEMONSTRATES THAT DEFENDANTS DID NOT DEMISE THE ENTIRE PREMISES TO MS. CAMPBELL.

Accurate analysis requires an appreciation of the nature of the question being posed.

First, at issue is whether Defendants are immune from tort liability -- **not** whether the terms of the lease would subject Defendants to tort liability in the first instance. Thus, the overarching background here is the intent of the Legislature as expressed in the governmental immunity statute.

Second, in light of that context, any exception to that statutory immunity must be narrowly construed. The specific statutory exception to be applied here[10] reads as follows:

> "Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental

[10]Because this case is governed by Hadfield v Oakland County Drain Commissioner, 430 Mich 139; 422 NW2d 205 (1988), Defendants' exposure to tort liability is not limited to the enumerated statutory exceptions as this Court held in Pohutski v City of Allen Park, 465 Mich 675, 689; 641 NW2d 219 (2002). Therefore, the applicable statutory exception is the one set forth in the text.

function. Except as otherwise provided in this act, **this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed**."

MCL 691.1407(1) (emphasis added).

The first sentence of that provision sets forth a broad grant of immunity. In Ross v Consumers Power Co (On Rehearing), 420 Mich 567; 363 NW2d 641 (1984), this Court noted the import of the Legislature's choice of language:

> "In contrast, the immunity from tort liability provided by §7 is expressed in the broadest possible language -- it extends immunity to *all* governmental agencies for *all* tort liability *whenever* they are engaged in the exercise or discharge of a governmental function."

Id. at 618 (emphasis in original).

The second sentence of the statute sets forth an exception to that broad grant of immunity. That being so, that sentence -- and, by implication, the case law thereby referenced -- is to be narrowly construed. See, e.g., Nawrocki v Macomb County Road Commission, 463 Mich 143, 158, 615 NW2d 702 (2002); Sziber v Stout, 419 Mich 514, 522, 358 NW2d 330 (1984); Mitchell v City of Detroit, 264 Mich App 37, 44, 689 NW2d 239 (2004).

Thus, the question presented here is whether a lease which limits a tenant's right to modify the premises or replace fixtures should be construed to mean that the governmental lessor has retained possession of the premises so as to become subject to tort liability for trespass-nuisance arising from an intrusion from the interstitial space between the inner and outer walls into the living area.

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A lease is a contract by which the rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration. Black's Law Dictionary (7th ed 1999), p 898. See also Department of Natural Resources v Board of Trustees of Westminster Church of Detroit, 114 Mich App 99, 104, 318 NW2d 830 (1982); Royal Oak Wholesale Co v Ford, 1 Mich App 463, 466, 136 NW2d 765 (1965).

The portions of the lease relevant to this issue read as follows:

> "Management hereby leases the Premises **for the exclusive use and occupancy by the following authorized members of Resident's Household listed below** . . ."
>
> * * * *
>
> "Resident and Resident's Household shall have the **exclusive right to occupy the leased Premises**, which shall include reasonable accommodation of Resident's guests or visitors who may not reside with Resident for longer than fifteen (15) days."
>
> * * * *
>
> "**1. General.** **Resident**, including Resident's household, guests, or others whom the Resident controls, **shall comply with the following rules.** Resident understands that Resident is responsible for all acts committed by Resident's household or guests or others whom the Resident controls and for requiring Resident's household and guests to comply with the same:"
>
> * * * *
>
> "f. To keep the Premises and such other areas and grounds **as may be assigned for his/her exclusive use** in a clean and safe condition."
>
> * * * *

"g. **To make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of Management**. To make no changes to locks or install new locks or anti-theft devices without written consent of Management. However, in the event Resident changes the locks, Resident shall provide Management with a key within ten (10) days. Otherwise, Resident will be charged for damage or expenses incurred because of Management's necessary entry into the dwelling unit."

(2a, 5a, 10a) (emphasis added).

The language of the contract is to be enforced as written. Rory v Continental Ins Co, 473 Mich 457, 468; 703 NW2d 23 (2005). There is absolutely nothing in the language of the lease which restricts the **physical extent of the lease** to anything less than the entire premises at 2357 St. Antoine, Detroit, Michigan. (2a). The use and right to **exclusive occupancy** therefore includes the entire premises.

The lease does prohibit the lessee from effecting repairs or alterations to the premises, and from replacing or adding fixtures.[11] Both restrictions merely protect the value of Defendants' interest in the premises. Neither constitutes a substantial limitation on MS. CAMPBELL's right to "the exclusive use and occupancy" and her "exclusive right to occupy the leased Premises".

[11]The range and stove were provided by Defendants with the rent of the premises. (5a). As such, they are considered fixtures under Michigan law. See, e.g., First Mortgage Bond Co v London, 259 Mich 688, 690-91, 244 NW 203 (1932); Peninsular Stove Co v Young, 247 Mich 580, 582-83, 226 NW 225 (1929).

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More to the point, **none of the restrictions as to repairing, altering, or replacing major components of the property has any rational connection to the geographical scope of the demised premises**.

The foregoing analysis yields a straightforward answer to the question presented. There is absolutely nothing in the terms of the lease which can rationally be construed as carving out of the demised premises **any** area (much less the space between the walls) to which Defendants retained a right of possession.

This is not a close case. So strong is the common law presumption that even a lease provision forbidding signs on exterior walls without the lessor's permission does not except the exterior walls from the scope of the lease:

> "We are of the opinion that there are no factors taking the present case out of the usual rule. It is of no consequence that Hamilburg [the lessor] reserves the right of access to the roof, or that there is no evidence that the plaintiff had any use for the outside walls. The provision precluding the placing of a sign by the plaintiff without Hamilburg's consent is, to be sure, for the benefit of the lessor. [Citation omitted]. But it is for his protection against the type of sign which might be placed by the lessee. **It did not amount to a reservation excepting the walls from the scope of the lease, nor did it restrict the lessee's rights to exclude the signs of others**."

265 Tremont Street, supra at 832 (emphasis added).

Finally, even if it were a close question, deference to the intent of the Legislature would dictate enforcing the Defendants' statutory immunity in these circumstances. See Nawrocki, supra; Sziber, supra.

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In the context provided by the foregoing, the error in the Court of Appeals' analysis and in the arguments advanced by Plaintiffs in this Court can be definitively dispatched.

The Court of Appeals raised and then resolved this question sua sponte, inventing an argument not even advanced by Plaintiffs. Specifically, the panel ruled that in the lease, Defendants had specifically maintained possession of the entire premises, which included the interstitial wall space:

> "In making determinations relative to 'cause' or 'physical intrusion' in this case, we must engage in a discussion of the interstitial space between the walls of the premises. **We** have studied the written lease between the parties and **conclude that the interstitial space between the walls of the premises belongs to the lessor. The language of the lease specifically provides that** the lessee resident agree to 'make no alterations or repairs or redecoration to the interior of the Premises or to install additional equipment or major appliances without the written consent of the Management.' The plain language of the contract indicates that **the lessees had no control over even the interior of the premises, let alone control over the interstitial space between the walls**. **Accordingly**, under our plain reading of the lease agreement, **the interstitial space is totally within the control of the lessor** and not subject to intervention by the lessee as a matter of law."

(113a-114a) (emphasis added).

That passage and the argument developed by Plaintiffs from it suffer from no less than five independent and alternative legal and logical flaws.

First, the conclusion that the interstitial space "belongs to" Defendants does not even address the issue in any meaningful legal sense. Literally speaking, the walls probably do "belong

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to" Defendants if one is speaking of title to the property, but that has nothing to do with the issue, which is whether Defendants maintained possession of any portion of the property. That linguistic carelessness is of a piece with the utter absence of any substantial or legal discussion or citation to any case law (e.g., the common law presumption discussed above).

Second, although the panel accurately quoted one passage from the lease, the conclusion that it reached was a breathtaking leap of illogic. The Court equated the inability to repair or alter the premises, or to replace the fixtures, with "**no control** over even the interior of the premises". (113a) (emphasis added). In fact, MS. CAMPBELL had "control" of the **entire** premises: She was given "exclusive use and occupancy" (2a). To posit that a person entrusted with "exclusive use and occupancy" has "**no control**" over the premises simply because the lease prohibits substantial alteration of the condition of the premises is facially absurd.

Third, the Court of Appeals' "analysis" is bereft of any reference to the context in which the issue is presented. The question is whether the lease carved out an exception to the common law rule sufficient to charge Defendants with possession of the interstitial space sufficient to trigger a narrowly construed exception to statutory immunity. As will be demonstrated next, that resulted in the panel addressing the wrong question.

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Fourth, the concept of "control" is simply not relevant to the discussion. Retaining "control" over certain areas is relevant to whether tort liability arises in the first instance, not to immunity from such liability. By positing "control" as the relevant factor, the Court of Appeals -- and Plaintiffs in this Court -- invoke the common law exception to the general rule of landlord non-liability for the condition of the leases premises:

> "As a general rule the owner of a building who has leased such building to another without any agreement to repair is not liable to a tenant or to his invitees for injuries sustained by reason of its unsafe condition. [Citations omitted]. However, this rule does not apply where the owner reserves control of a portion of the premises for use in common by himself and the tenants, or by different tenants. [Citations omitted]. . . . Exceptions to the general rule are most often found in cases where injuries occur in the use of stairways, hallways, and elevators where either the owner has control or the owner and the tenant have joint control."

Boe v Healy, 84 SD 155; 168 NW2d 710, 712 (1969). Boe involved a fire which originated in the basement of a multi-dwelling building, which was a common area. 168 NW2d at 711. See also Leavitt v Glick Reality Corp, 362 Mass 370; 285 NE2d 786, 788-789 (1972) (landlord was in control of the wiring in the ceiling of a multi-tenant building).

The conceptual flaw in citing these cases is that doing so confuses the elements necessary to liability with the elements necessary to an exception to statutory immunity from such liability. There is no question but that in the absence of Michigan's governmental immunity statute, Plaintiffs would have a jury

submissible case of negligence. But that is not the issue here. Rather, the question is whether the circumstances of the instant case constitute a trespass-nuisance, which in turns depends upon whether Defendants were in possession of the interstitial space **within the meaning of that exception to governmental immunity**.

Fifth, even if control were relevant, the control necessary even to impose tort liability is not reserved by the lease. In landlord/tenant situations, the degree of retained control necessary to impose a duty on the landlord is governed by the intent of the landlord to exercise the kind of control set forth in §328E of the Restatement. DeLeon v Creeley, 972 SW2d 808, 812 (Tex App 1998). That provision reads as follows:

> "A possessor of land is
>
> "(a) a person who is in occupation of the land within intent to control it or
>
> "(b) a person who has been in occupation of land within intent to control it, if no other person has subsequently occupied it within intent to control it, or
>
> "(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

Restatement, Torts (2d), §328E.

The commentary informs us that the "possession" defined by §328E is not the formalistic type premised on legal relations, but rather is "possession" in the real-world factual sense.

> "'Possession' has been given various meanings in the law, and the term frequently is used to denote the legal relations resulting from facts, rather than in the sense of describing the facts themselves. It is

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used here strictly in the factual sense, because it has been so used in almost all tort cases."

Id., Comment a.

The Prosser hornbook underscores that point by emphasizing that a landlord's retention of the right to enter in limited circumstances does not amount to the type of control sufficient to trigger landlord liability.

> "A variety of ingenious theories have been advanced in support of this liability. **An older, popular one is that under the agreement to repair the lessor retains the privilege to enter and supervise the control of the property, and so is 'control' of it, and therefore subject to the same duties as an occupier**. On this basis a few courts have held them liable to persons outside of the premises where he merely reserves the right to enter and repair, without obligating himself to do so; but as to persons on the land most of the courts have refused to go so far. **It seems obvious that the lessor's 'control,' even under a convenant, is a fiction devised to meet the case, since he has no power to exclude any one, or to direct the use of the land, and it is difficult to see how his privilege to enter differs in any significant respect from that of any carpenter hired to do the work**."

Prosser & Keaton on Torts (5th ed) (West 1984), §63, p 444 (emphasis added).

The Rhode Island Supreme Court rejected a plaintiff's attempt to invoke "retained control" liability on the basis of a lease requiring the landlord to keep the exterior in repair and to replace broken windows. Rejecting the claim of a woman injured by a defective window fixture, the court cited Prosser and said:

> "We too reject the fiction that a covenant to repair in and of itself and without something more constitutes such a reservation of control so as impose

upon defendant liability for the injuries sustained by plaintiff."

Monti v Leand, 108 RI 718; 279 A2d 743, 745 (1971). See also Chambers v Buettner, 295 Ala 8, 321 So2d 650 (1975) (no evidence that landlord retained control of area where electrical conduit located); Gilbreath v J H Greenwalt, 88 Ill App 3d 308, 410 NE2d 539 (1980) (lessor not generally liable for injuries resulting from defective conditions where premises are wholly demised).

In the instant case, it is undisputed that the premises were completely demised. (5a, ¶V.). ("Resident . . . shall have the exclusive right to occupy the leased premises".) The sole basis for the Court of Appeals' finding of retained "control" of the interstitial space were provisions in the lease in which Defendants retained under the agreement to repair the "privilege to enter and supervise the condition of the property". That would be insufficient even to impose liability under the common law theory invoked by Plaintiffs in the cases they cite. It cannot rationally be found sufficient to impose liability for **trespass**-nuisance based upon Defendants' purported occupancy of the interstitial space.

In sum:

(1) The common law rule is that absent contrary language in the lease, the demised premises include all space to the outer walls;

(2) In the instant case, the lease contains no language which can rationally be construed as creating an exception to that rule; and

(3) The Court of Appeals and Plaintiffs invoke a type of "control" which is irrelevant to the analysis

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and, in any event, inapplicable in the circumstances of the instant case.

C. IN ANY EVENT, PLAINTIFFS' EXPERT TESTIFIED THAT THE ORIGIN OF THE FIRE WAS IN THE DUPLEX PLUG, WHICH WAS PART OF THE DEMISED PREMISES.

Plaintiffs fail to address the fact that their claims rest upon an assertion that the fire originated not just in the interstitial wall space, but **inside the tenant's electrical outlet**. (See Plaintiffs' Response to Application for Leave To Appeal, p. 4-5). Plaintiffs' electrical expert Daniel Churchward has opined that the fire began due to arcing inside the outlet, and traveled out of the outlet and into the interstitial wall space. (40a, p 46-48).

Even assuming *arguendo* that the interstitial wall space was not part of the demised premises, there can be no question that the tenant's bedroom's electrical outlet was a part of the demised premises. The tenant, JO-ANN CAMPBELL, even paid for her electricity directly to the utility company; Defendants were not involved in the providing of electricity to the apartment (5a, part III.A.3.). As the fire allegedly originated inside the tenant's electrical outlet, which was attached to the tenant's bedroom wall and was present for use by the tenant, there can be no trespass.

RELIEF

Defendants-Appellants/Cross-Appellees, prays this Honorable Court to issue an opinion or order reversing the Court of Appeals' holding that Plaintiffs may maintain an action for trespass-nuisance, and to remand this case for entry of judgment in favor of Defendants.

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STATE OF MICHIGAN
IN THE SUPREME COURT

JOYCE McDOWELL, A Former Special Personal Representative of the Estate of BLAKE BROWN, Deceased, JOYCE BROWN, Deceased, CHRISTOPHER BROWN, Deceased, NAOMI FISH, Deceased, JOHNNY C. FISH, Deceased, JERMAINE FISH, Deceased, as Special Conservator of JONATHAN FISH, a Minor and as Special Conservator of JOANNE CAMPBELL and JUANITA FISH, Adults, Plaintiffs-Appellees, v CITY OF DETROIT, Individually and Acting By and Through the DETROIT HOUSING COMMISSION, Defendants-Appellants. /	Supreme Court No. 127660 Court of Appeals No. 246294 Wayne County Circuit Court No. 00-039668-NO

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

KATHY JOZSA, being first duly sworn, deposes and says that on the 7th day of March, 2006, she did serve two copies of **DEFENDANTS-APPELLANTS' BRIEF ON APPEAL and this PROOF OF SERVICE** upon: **GEOFFREY N. FIEGER, ESQ./VICTOR S. VALENTI, ESQ. (Attorneys for Plaintiffs), 19390 W. Ten Mile Road, Southfield, MI 48075 AND STUART A. SKLAR, ESQ. (Attorney for Plaintiffs), 31800 Northwestern Highway, Suite 205, Farmington Hills, MI 48334**, by mailing same to said attorneys in a sealed envelope, properly addressed, with first class postage prepaid thereon, and by depositing same in the United States Mail at Detroit, Michigan.

Kathy Jozsa
KATHY JOZSA

Subscribed and sworn to before me
this 7th day of March, 2006.

Barbara A Lamb
Notary Public: BARBARA A. LAMB
Macomb County, Michigan
My Commission Expires: 6/22/10
Acting in Wayne County